STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARIA PORTILLA	)	
	)	
VS.	)	W.C.C. 02-04985
	)	
R. I. JANITORIAL	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the appeal of the employee's attorney in which he alleges that the trial judge erred in imposing certain sanctions against him and including certain findings and orders in the decision and decree. After thorough review of the record and consideration of the arguments of the respective parties, we grant the appeal in part and deny it in part.

On July 15, 2002, an original petition was filed by attorney Christopher Fay's office which alleged that Maria Portilla sustained injuries to her chest and low back on August 2, 2001 during the course of her employment with the respondent. The petition further alleged that she was totally disabled from August 2, 2001 to January 7, 2002 and partially disabled from January 8, 2002 to January 14, 2002. At the pretrial conference on August 8, 2002, the petition was denied and a claim for trial was filed by an attorney in Mr. Fay's office on behalf of the employee.

The employee testified through two (2) different interpreters on three (3) occasions. It is apparent from the record that the interpreters were provided by the employee. The affidavits and

records of Roger Williams Medical Center and Dr. Anthony Donatelli were submitted to the court in support of her petition. Counsel for the employer presented the testimony of the owner, Carlos DaSilva, and records depositions containing the records of Dr. Anthony Donatelli, Dr. Roderick Beaman, Roger Williams Medical Center, the Metropolitan Insurance Company and G. Tanury Plating Company.

Ms. Portilla stopped attending school in the fourth grade in Mexico. She indicated on her job application that she entered the United States in 1978. She stated that she understood and could speak a little bit of English, but was unable to read or write in English. During her testimony on direct examination, the employee described how she was injured while working for Rhode Island Janitorial on August 2, 2001. She denied any prior injury to her back, arm and left side.

On cross-examination it was elicited that the employee's attorney referred her to Drs. Beaman and Donatelli at Rhode Island Medical Rehabilitation for treatment. Ms. Portilla acknowledged that after the alleged injury on August 2, 2001, she continued to work full-time at a second job at G. Tanury Plating Company, sorting and cleaning small pieces of jewelry. She also admitted that she had been involved in a motor vehicle accident on July 21, 2001 and sustained injuries to her neck and back. On the recommendation of an attorney from Fay Law Associates, the employee treated with Dr. Edward Gallucci, a chiropractor, for her injuries sustained in the motor vehicle accident. As a result of the efforts of Fay Law Associates, she received a settlement for damage to her vehicle and her personal injuries.

Carlos DaSilva, the owner of Rhode Island Janitorial, testified that Ms. Portilla had been working for him for about three (3) to four (4) years as a full-time employee. On August 2, 2001, Mr. DaSilva met with the employee on the job site for about one (1) hour at her request.

She asked if she could come in late a couple of days because her attorney wanted her to treat with a doctor a few times a week for injuries sustained in the motor vehicle accident on July 21, 2001. Mr. DaSilva stated that the employee also asked if she could be paid in cash or under someone else's name because of the motor vehicle accident lawsuit. He asserted that she never mentioned that she fell at work that night.

Records of Roger Williams Medical Center reflect that the employee was seen in the emergency room on July 21, 2001 complaining of headache and pain on her left side resulting from a motor vehicle accident. The diagnosis was a pulled muscle in the back of her neck and injury to her left shoulder, left upper arm and left thigh. She was then seen by Dr. Gallucci, a chiropractor, on July 24, 2001, for complaints of constant neck discomfort, headache, and mid-back pain. The doctor treated Ms. Portilla twice a week for about three (3) months, including on August 3, 2001, the day after the alleged work injury. There is no mention in any of his reports regarding an injury at work.

The first medical report regarding the alleged work injury is from Roger Williams Medical Center dated August 11, 2001. The report notes that the history was obtained with assistance from a family member and that the employee was a "good historian." The employee provided a fairly detailed description of the circumstances of the fall at work which occurred about a week ago. She denied any previous recent injury, despite the fact that she was involved in the motor vehicle accident on July 21, 2001. The diagnosis was a lumbar strain.

On August 24, 2001, Ms. Portilla began treating with Drs. Beaman and Donatelli for complaints of low back pain, mid-back pain, upper back pain, neck pain, headache, and left arm pain. There is no mention in any report of Drs. Beaman and Donatelli regarding the motor vehicle accident.

Payroll records from G. Tanury Plating Company reveal that Ms. Portilla worked full-time continuously from July 14, 2001 and continuing beyond January 2002. The day after the alleged work injury on August 2, 2001, she worked nine (9) hours and worked almost forty (40) hours that week. The petition filed by her attorney makes no mention of this second employer and alleges that the employee was totally disabled from August 2, 2001 to January 7, 2002 and partially disabled from January 8, 2002 to January 14, 2002.

The petition was denied at the pretrial conference and the employee claimed a trial. After several days of testimony from the employee and Mr. DaSilva spread out over three (3) months, counsel for the employer filed a motion for attorneys' fees, costs and sanctions, and a motion requesting that the trial judge refer the employee and/or her attorney to the Attorney General's office for review of the matter in accordance with R.I.G.L. § 28-33-17.3(b). The trial judge heard the motions on June 4, 2003 and took them under advisement.

On October 7, 2003, the trial judge issued a written decision denying the employee's original petition. He found the employee to be totally lacking in credibility and rejected her testimony. He also noted that the medical opinions relied upon by the employee lacked sufficient foundation as neither Dr. Donatelli nor Dr. Beaman had any information as to the automobile accident. Consequently, the trial judge denied and dismissed the employee's original petition.

In the written decision regarding the original petition, the trial judge also addressed the two (2) motions filed by the employer requesting sanctions and the assessment of costs and attorneys' fees against the employee and Attorney Fay for bringing the petition without reasonable grounds, and requesting the matter be referred to the Attorney General. The trial judge found that the employee and her attorney had violated R.I.G.L. §§ 28-33-17.3(a)(3) and

28-33-17.3(b) and ordered that the matter be referred to the Attorney General for review, that Fay would be referred to the Disciplinary Counsel, and that Fay must reimburse the employer's attorney the sum of Six Thousand Nine Hundred Forty-nine and 00/100 ($6,949.00) Dollars for time expended defending the petition, plus costs.

Prior to the decree being entered in this matter, Fay filed a motion to stay the entry of the decree and a second motion requesting that the trial judge seal or otherwise redact the references to the sanctions and referrals to the Attorney General and Disciplinary Counsel from the proposed decision. The motions were denied and the decree was entered on October 24, 2003. The employee filed a claim of appeal. Subsequently, the employee, individually, withdrew her appeal as to any issues pertaining to her petition, but allowing attorney Fay to pursue his interests in the appeal.

Fay has filed fifteen (15) reasons of appeal with the court. A number of them are simply general allegations of error on the part of the trial judge or have to do with the decision on the merits of the case. Any reasons alleging error on the part of the judge in deciding the merits of the original petition are no longer before this panel in light of the employee's withdrawal of her interests in the appeal. The only issues we will address are those directly involving attorney Fay – the imposition of sanctions and assessment of fees and costs, the referral to the Disciplinary Counsel, and the referral to the Attorney General.

Section 28-33-17.3(a)(1) of the Rhode Island General Laws authorizes the court "to impose sanctions and penalties necessary to maintain the integrity of and to maintain the high standards of professional conduct in the workers' compensation system." R.I.G.L. § 28-33-17.3(a)(1). The statute further advises that any pleading filed in a workers' compensation matter "shall be considered an attestation by counsel that valid grounds exist for the position taken and

that the pleading is not interposed for delay." Id. In the event that a judge concludes that a petition has been brought by an employee or her counsel without reasonable grounds, the trial judge shall assess the entire cost of the proceedings against the responsible party. Furthermore, R.I.G.L. § 28-33-17.3(a)(5) provides that the Disciplinary Counsel shall be notified of any such action taken against an attorney.

Attorney Fay filed the original petition on July 15, 2002, almost a year after the alleged work injury occurred. The petition alleged that the employee was totally disabled from August 2, 2001 to January 7, 2002 and partially disabled from January 8, 2002 to January 14, 2002. The wage records produced at trial from G. Tanury Plating, Ms. Portilla's second employer, reflect that she continued to work full-time there, directly contradicting any allegation of total disability. The petition also states that the employee received medical treatment from Roger Williams Hospital and Dr. Edward Gallucci. The reports of Dr. Gallucci, who treated the employee for injuries sustained in the motor vehicle accident, were presented by the employer and make no mention of an injury at work on August 2, 2001, despite the fact that the doctor saw the employee on August 3, 2001.

Attorney Richard Brederson, an employee of Fay, conducted direct examination of the employee and presented the affidavit and records of Dr. Anthony Donatelli. Dr. Donatelli did treat the employee for the alleged work injury, but his reports do not contain any history regarding the motor vehicle accident, which occurred less than two (2) weeks before the alleged work injury. The records also do not contain any information as to the employee's job duties. There is no indication in the record that any effort was made to ensure that the doctor had an accurate history and adequate foundation for his opinion on causation. In addition, the employee initially responded that she had not sustained any injury to her back, arm or left side prior to

August 2, 2001. However, on the date of the motor vehicle accident she complained of injuries to the left side of her body at the hospital, and Dr. Gallucci treated her for mid-back pain and even neck pain caused by the accident.

Fay's office handled both the motor vehicle accident case and the workers' compensation case of Ms. Portilla. His office referred her to Dr. Gallucci, a chiropractor, on July 24, 2001 for treatment of injuries sustained in the accident. About one (1) month later, Ms. Portilla was seen by a different physician, on referral from Fay's office, for the alleged injury at work. The medical reports of both physicians were addressed to Fay. A cursory reading of the reports would easily reveal that the doctors did not have a complete history and that this would present a problem in establishing causation due to the proximity of the incidents and similarity of physical complaints. The information was never provided to the doctors for their consideration. Fay's office simply submitted Dr. Donatelli's reports which were clearly not adequate to satisfy the burden of proof under the circumstances.

As noted above, the petition was filed a year after the incident. Certainly, the attorney had ample opportunity to fully apprise himself of all of the facts and circumstances of the case before filing the petition. Section 28-35-28(b) of the Rhode Island General Laws sets forth the deferential standard of review on appeal. "The findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." R.I.G.L. § 28-35-28(b). After thoroughly reviewing the record in this matter, we find that the trial judge's conclusion that attorney Fay had filed and prosecuted this workers' compensation claim without reasonable grounds in violation of R.I.G.L. § 28-33-17.3(a)(3) is not clearly erroneous.

In his fourth reason of appeal, Fay contends that sanctions cannot be assessed against him because he was not present and participating in the trial. We find no merit in this contention.

Fay put his name on the original petition indicating he was Ms. Portilla's attorney. The attorneys who were present during the proceedings were associates in Fay Law Associates, Christopher Fay's law firm. The medical reports of Drs. Gallucci, Donatelli and Beaman were addressed to Fay. Fay signed the Notice of Intention to offer Medical Affidavit for the affidavits and records of Roger Williams Hospital and Dr. Donatelli which were submitted to the court. In addition, Fay submitted his own affidavit stating that he undertook the representation of Ms. Portilla, had reasonable grounds to file the petition, and relied upon the information supplied by Ms. Portilla and the supporting medical documentation in filing the petition. In light of the documentation establishing that Fay was the primary attorney on the case, he cannot evade responsibility simply because he sent his associates to handle the hearings in court.

Fay also faults the trial judge for permitting and relying upon testimony provided through interpreters who were not qualified. The record reflects that the employee and her attorney supplied the interpreters for the hearings during which the employee testified. There was never a request made by counsel to the court for a list of qualified interpreters or to supply an interpreter. The court is not under any obligation to make an interpreter available in a workers' compensation matter. If counsel believed that the reliability and accuracy of the interpreting was an issue, he should have raised the issue during the trial. Due to the total failure to bring this issue to the trial judge's attention during the trial, we find that any argument as to the qualifications of the interpreters has been waived.

In his seventh reason of appeal, Fay argues that the trial judge erred in ruling on the motion for sanctions without providing him an opportunity to be heard. Counsel for the employer filed the motion for referral to the Attorney General's office and the motion for attorneys' fees, costs and sanctions on June 9, 2003. Copies of the motions, which contained the

hearing date of June 16, 2003, were sent by facsimile and regular mail to Fay on June 9, 2003. Fay chose not to appear in court on June 16, 2003, instead sending attorney Richard Brederson to handle the matter. The trial judge allowed attorney Brederson to present whatever information or argument he wished to have the court consider on June 16, 2003. The record reflects the arguments made by counsel, but there was no request for any further hearing or opportunity for Fay to testify or present any other information or argument. (*See* Tr. 100-117.) Clearly, Fay's contention that he was not provided an opportunity to be heard is entirely without merit.

As a consequence of the finding that Fay violated R.I.G.L. § 28-33-17.3(a)(3), the statute states that the "appropriate body with professional disciplinary authority over the attorney shall be notified of the action." R.I.G.L. § 28-33-17.3(a)(5). The Rules of the Rhode Island Supreme Court regarding the disciplinary procedure for attorneys provide that all proceedings involving allegations of misconduct by an attorney shall be confidential until and unless a finding of probable cause is made. Supreme Court Rules, Art. III, Rule 21. We believe this rule is intended to include any referral or complaint made to the Disciplinary Counsel. Due to the fact that the decisions and decrees of the court are a public record, the proper procedure is for the trial judge to make such a referral privately. Therefore, we find that the trial judge did err in including any reference to the referral to the Disciplinary Counsel in the decision and decree.

In his decision, the trial judge also referred to R.I.G.L. § 28-33-17.3(b)(1), which provides, among other things, that it is unlawful to make or cause to be made, and present or cause to be presented, any false or fraudulent material statement or representation for the purpose of obtaining compensation. Section 28-33-17.3(b)(3) states that a person who engages in such activity is subject in criminal proceedings to a fine and/or penalty and/or imprisonment. The Workers' Compensation Court lacks jurisdiction to conduct any type of criminal proceeding and

is therefore not empowered to make any finding as to a violation of that statute. Consequently, the trial judge erred in making a finding in his decree that there was a violation of R.I.G.L. § 28-33-17.3(b). In the event that a trial judge is concerned that a potential violation of this statute took place during the proceedings before him or her, the proper procedure is to privately refer the matter to the Attorney General's office for investigation rather than include such a referral in the decision on the merits of the petition, which becomes a matter of public record.

In reviewing the written decision of the trial judge, we have noted that the statutory references to the provisions which were the subject of the motions are incorrect. As noted above, we are affirming the trial judge's determination that the petition was brought without reasonable grounds and the assessment of the cost of the proceedings pursuant to R.I.G.L. § 28-33-17.3(a)(3). This provision was inadvertently referred to as R.I.G.L. § 28-33-17.3(2) in the decision. (Trial Op. 11.) At one point, the trial judge also incorrectly cited the criminal provision of the statute as R.I.G.L. § 28-33-17.3(5)(b), rather than R.I.G.L. § 28-33-17.3(b). We note these corrections only to clarify the portions of the statute involved in the matter.

Based upon the foregoing discussion, the appeal of attorney Christopher Fay is granted in part and denied in part. Due to our concerns regarding the inappropriate inclusion in the trial decision and decree of discussion and findings on certain subjects, we are ordering that the trial decision and decree, as well as the decision and final decree of the Appellate Division be sealed and made available only to the Rhode Island Supreme Court for any further proceedings. In accordance with our decision, a new decree shall enter containing the following findings and orders:

1. That the employee has failed to prove that she sustained an injury to her chest and low back on August 2, 2001, arising out of and in the course of her employment with the respondent.

2. That the petition was brought by Christopher E. Fay, counsel for the employee, without reasonable grounds.

3. That the affidavits of time and costs presented by counsel for the employer are fair and reasonable.

It is, therefore, ordered:

1. That the original petition is denied and dismissed.

2. That pursuant to R.I.G.L. § 28-33-17.3(a)(3), attorney Christopher E. Fay shall pay the firm of Higgins, Cavanagh & Cooney the sum of Six Thousand Nine Hundred Forty-nine and 00/100 ($6,949.00) Dollars for time expended in defense of the original petition.

3. That pursuant to R.I.G.L. § 28-33-17.3(a)(3), attorney Christopher E. Fay shall pay the firm of Higgins, Cavanagh & Cooney the sum of Two Hundred Seventy-four and 00/100 ($274.00) Dollars as reimbursement for costs incurred in the defense of the original petition.

4. That the decision and decree of the trial judge in this matter shall be sealed and made available only to the Rhode Island Supreme Court for the purpose of any further proceedings.

5. That the decision and final decree of the Appellate Division in this matter shall be sealed and made available only to the Rhode Island Supreme Court for the purpose of any further proceedings.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a decree, a copy of which is enclosed, shall be entered on

Connor and Ricci, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ricci, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

MARIA PORTILLA	)	
	)	
VS.	)	W.C.C. 02-04985
	)	
R. I. JANITORIAL	)	

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard before the Appellate Division upon the appeal of attorney Christopher E. Fay, counsel for the employee/petitioner. Upon consideration thereof, the appeal is granted in part and denied in part. In accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the employee has failed to prove that she sustained an injury to her chest and low back on August 2, 2001, arising out of and in the course of her employment with the respondent.

2. That the petition was brought by Christopher E. Fay, counsel for the employee, without reasonable grounds.

3. That the affidavits of time and costs presented by counsel for the employer are fair and reasonable.

It is, therefore, ordered:

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4. That the decision and decree of the trial judge in this matter shall be sealed and made available only to the Rhode Island Supreme Court for the purpose of any further proceedings.

5. That the decision and final decree of the Appellate Division in this matter shall be sealed and made available only to the Rhode Island Supreme Court for the purpose of any further proceedings.

Entered as the final decree of this Court this day of

BY ORDER

_____
John A. Sabatini, Administrator

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Ricci, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Edward John Mulligan, Esq., and Susan Pepin Fay, Esq., on

_____